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Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

SANDRA S. BARNES
Petitioner,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

1. Whether the Standard Used for a Successful Hostile Work Environment Sexual Harassment action in the Sixth Circuit Court of Appeals and the U.S. District Court for the Eastern Division of Kentucky is greater than the standard as established by the U.S. Supreme Court and the other circuits.

PARTIES TO THE PROCEEDING

The Petitioner is Sandra S. Barnes. The Respondent is the Montgomery County Board of Education.

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NO. 97-

SANDRA S. BARNES
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MONTGOMERY COUNTY BOARD OF EDUCATION
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Sandra S. Barnes, petitions as follows for a Writ of Certiorari to review the May 14, 1997 Opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment entered by the United States District Court for the Eastern District of Kentucky, on July 26, 1995.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, in Appeal No. 95-6121, rendered May 14, 1997, is unreported. (Appendix A)

The Opinion of the U.S. District Court was entered on July 24, 1995 for the Eastern District of Kentucky at Lexington, and the judgment was entered on July 26, 1995, No. 93-305, granting Respondent's judgment as a matter of law is unreported. (Appendix B & C).

JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its opinion on May 14, 1997. This Petition is filed within 90 days after the entry of the Judgment of the Court of Appeals on May 14, 1997.

The jurisdiction of this Court to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

Title VII, 42 U.S.C. §2000(e)-2

a) Employer practices

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way

which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

STATE STATUTE INVOLVED

KRS 344.040

It is unlawful practice for employer:

(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's disability, race, color, religion, national origin, sex, age between forty (40) and seventy (70), or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking; or

(2) To limit, segregate, or classify employees in any way which would deprive or tend to

deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's disability, race, color, religion, national origin, sex or age between forty (40) and seventy (70), or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking; or . . . .

STATEMENT OF THE CASE

A. Procedural Posture:

This Petition for Writ of Certiorari ("Petition") arises from a complaint filed by Plaintiff-Petitioner Sandra S. Barnes (hereinafter Barnes) on July 20, 1993, in the United States District Court for the Eastern District seeking relief on the basis of sexual discrimination in violation of Title VII, 42 U.S.C. §2000(e)-2 and KRS 344.040 from her employer, Defendant-Respondent, Montgomery County Board of Education (hereinafter Board of Education) and individually against her supervisor, Tim Keenan and the Superintendent, Richard Hughes. (TR 1).

On August 11, 1993, Defendant Keenan filed a Motion to Dismiss or in the Alternative for Summary Judgment and a Memorandum in Support. (TR 10). Barnes filed her response in opposition on September 1, 1993. (TR 14). On April 4, 1994, the District Court entered an Opinion and Order denying Keenan's Motion for Dismissal or Summary Judgment. (TR 25). Keenan renewed his Motion to Dismiss and For Summary Judgment on July 14, 1994, to which Barnes responded. (TR 45 and 49). The District Court dismissed Keenan and Hughes in their individual capacity and held the renewed Motion to Dismiss and Summary Judgment was moot on August 15, 1994.

On November 9, 1994, the Board of Education filed a Motion to Dismiss to which Barnes responded. (TR 73 and 74). The court entered an Order on December 2, 1994, denying the Board of Education's Motion to Dismiss. (TR 86). On March 1-2, 1995, a jury trial was held a verdict was entered on March 3, 1995, that Barnes had proven her hostile working environment sexual harassment claim and awarded her damages in the amount of $159,895.00. (TR 133). On March 14, 1995, Board of Education filed a Motion as Matter of Law to which Barnes responded on March 22, 1995. (TR 135 and 139). On July 24, 1995, the district court issued an opinion and order granting the Board of Education's Motion on the basis that Barnes verdict on hostile working environment sexual harassment was unsupported by evidence that the employer had any knowledge of her supervisor's conduct.

On August 22, 1995, Barnes filed a timely Notice of Appeal from the district court's judgment order. (TR 145). On May 14, 1997, the United States Court of Appeals for the Sixth Circuit announced its decision affirming the judgment of the United States District Court of the Eastern Division of Kentucky on the basis that Barnes failed to demonstrate an objectively abusive or hostile work environment.

B. Facts:

Barnes had been employed by the Montgomery County School Board for some twenty years as a school bus driver receiving excellent evaluations. In the school term of 1991-92, she had a new supervisor, Tim Keenan, Director of Transportation. (Vol I, TE 57,93). Beginning in late March 1992, after she volunteered for a special bus trip, her supervisor, Tim Keenan, started calling her into his office and rubbed up against her several times. His conduct made her

very uncomfortable and she tried to stay away but his secretary continued to call her stating he wanted to speak with her about the upcoming trip. Not only did he get close to her during these meetings and rub up against her but he made comments to her if any problems occurred to call him directly rather than the Maintenance Manager as has been the usual practice. He informed her to "call him directly" and he would come to her. She avoided calling him directly upon her return by contacting the female clerk and informing her of her return and she additionally informed the clerk she would be in the bus garage the next day cleaning her bus. The transportation clerk contacted Keenan and informed him what Barnes had stated. (Vol. 1 TE 70-71).

The next day when Barnes was in the bus garage alone, Keenan, her supervisor, arrived and touched her buttocks. She immediately slapped him and told him she was going to inform his boss, the Superintendent, whereupon he laughed and told her this would not help her as the Superintendent would not believe her as he had not believed other women who had complained about him. He further informed her he would instead have her terminated. (Vol. 1 TE 72-73). She knew of at least two other females around this same period who had contacted the Superintendent as they had been physically abused by her supervisor and no action had been taken against him.

In a few weeks after the garage incident, an allegation was made by another employee who was upset with Barnes over a personal matter and made a statement that it appeared Barnes had misreported her time on a bus trip. This statement was made in the presence of Keenan and he took it upon himself to report this lie by an upset employee to Superintendent Hughes. (Vol. I, TE 62, 137; Vol. II, 103-104). The upset employee later changed her statement and

it was proven before any action was taken against Barnes by Barnes herself through detailed accounting of the time, telephone documents from one of the students who had called home when the bus was stopped at a rest area, and one of the children's parent's statement as to the time of her return that she had not padded her hours. This information was again presented at trial and proved the allegations were simply a pretext to terminate Barnes and the investigation done by her supervisor, Keenan, as to the padding of her hours was not checked out by any higher authorities. (Vol II, 77-78; 102-103).

However, no action was taken against Barnes until after her supervisor, Keenan, gave her an annual evaluation. Barnes had attempted to stay away from any contact with her supervisor, Keenan, as she was extremely upset about his touching her and the comments he had made to her which created a hostile and abusive work environment. Barnes did not know what steps to take to prevent further harassment since any reports by other females had resulted in no action. Barnes was contacted to report to her supervisor's office for her annual performance evaluation. Once inside, he closed the door and proceeded to inform her he had always liked her ...would buy her anything she wanted...all she had to do was be available when he wanted in order to keep her job. Barnes could not believe he was demanding she have sex with him to keep her job. Her supervisor further informed her he had two evaluations and would give the bad one recommending her employment not continue to the Superintendent if she did not meet his terms. (Vol. I, TE 86-87; TE 122-123). Barnes ran crying out of the office. Again, her supervisor had been rejected and he turned in the recommendation her employment not be continued.

Barnes attempted immediately to contact the Superintendent telling him she must talk to him in person. Barnes was so humiliated and ashamed of Keenan's actions she did not want to discuss this harassment with anyone but wanted to talk with the Superintendent in person to try to tell him. She informed the Superintendent she had not padded her hours and the recommendation by her supervisor to not continue was not because of the alleged pretext of padding her time. She attempted on numerous occasions to arrange to talk to the Superintendent in person as she was very ashamed and unable to discuss the terms of sex demanded of her by her supervisor over the telephone. She was informed on one of these telephone conversations with the Superintendent that he would not go over her supervisor's head and if she wanted to stay in that position she had to convince her supervisor to keep her. Barnes had no avenue for relief. (Vol. I, TE 88; Vol II, TE 37)

ARGUMENT

I. WHETHER THE STANDARD USED FOR A SUCCESSFUL HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT ACTION IN THE SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT FOR THE EASTERN DIVISION OF KENTUCKY IS GREATER THAN THE STANDARD AS ESTABLISHED BY THE U.S. SUPREME COURT AND THE OTHER CIRCUITS.

Hostile work environment was first recognized as an actionable theory under Title VII in this court in *Meritor Savings v. Vinson* , 477 U.S. 57 (1986). To establish a *prima facie* case an employee must prove: 1) they belong to a protected group, *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); 2) the employee was subject to

"unwelcome" sexual harassment, *Meritor* at 69 and *Henson* at 903; 3) the harassment was based on sex, *Henson* at 903; 4) the harassment complained of must be sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working environment, *Meritor* at 68; and 5) the Plaintiff must establish the employer's liability *Meritor* at 73.

A female surgical resident filed a sexual harassment claim pursuant to Title VII alleging that the atmosphere was extremely hostile to women, *Lipsett v. University of Puerto 'Rico*, 864 F.2d 881 (1st Cir. 1988). Upon summary judgment being granted by the District Court, a reversal stated there were genuine issues of material fact and the defendants knew or should have known of the sexual harassment and a jury verdict was obtained on remand.

In the second circuit, female employees brought a Title VII action alleging their manager created a hostile work environment by making vulgar comments and gestures and pretending to masturbate and ejaculate behind the employee's backs. *Kotcher v. Rosa & Sullivan Appliance Ctr*, 957 F.2d 59 (2nd Cir. 1992). The District Court held that the employees had established a hostile work environment but remanded for a determination based upon whether a reasonable avenue for complaint existed or if the employer knew of the harassment.

In *Ross v. Double Diamond, Inc.*, 672 F. Supp. 261, 270-71 (N.D. Tex. 1987) the court concluded that a short duration of employment did not necessarily preclude a claim of hostile environment harassment when the Plaintiff was subjected to such harassment during only two days of her employment by her supervisor who participated in the taking of a photograph up her dress and grabbing her.

A New York employee who filed a claim for hostile environment harassment was successful when the court held that she had proven her claim of hostile work environment when she proved she had been called a "whore" on five occasion over a month. *EEOC v. A. Sam & Sons Produce, Co.*, 872 F. Supp. 29, 35 (W.D.N.Y. 1994).

A ninth circuit sexual harassment claim was successful when the court held that a female black jack dealer who alleged sexual harassment when her supervisor used sexual epithets and offensive reference to women's bodies creating a sufficiently severe or pervasive hostile work environment of sexual harassment. *Steiner v. Showboat Operating Co.*, 25 F. 3d 1459 (9th Cir. 1994) *cert. denied* 115 Sup. Ct. 733 (1994). When the Plaintiff first complained she was moved but the harassment continued and the employer defended on the basis that the supervisor was equally hostile and negative toward females and males. The court held that Plaintiff proved her sexual harassment and the employer was liable.

In the case at hand, the District Court reviewed the evidence based on the totality of the circumstances and determined that Barnes had proven the evidence was sufficient on the basis of hostile work environment in that she had proven the severity and pervasiveness of her environment. Petitioner had been rubbed up against by her supervisor on more than one occasion when he had called her into his office prior to a bus trip for which she had volunteered, he had fondled her buttocks when he found her in the parking garage alone, and then demanded she be available for sex with him whenever he desired if she wanted to keep her employment. (Vol. I, TE 70-73). All of these incidents occurred beginning in March and ended in May, when upon being rejected, the supervisor recommended Petitioner's employment not continue.

The district court in overruling Respondent's Motion for a Directed Verdict determined the evidence was sufficient as a matter of law and submitted the issues of fact to the jury to be determined on the totality of the circumstances (not isolated incidents) as to whether Barnes had met her standard of proof on hostile work environment and whether the employer knew or should have known of the supervisor's hostile conduct. At the conclusion of all the evidence Respondent requested and stated to the court,

The Court: Just renewing your other motions?

Mr. Fogle: Motion to dismiss, your Honor.

The Court: All right. I do believe there's a jury question. You've got a couple of technical points that I might look at later, but, at this point, I think there's a jury question. So I'll overrule the motion to dismiss. (Vol. II, TE 144).

Later, for whatever reason, since the court had heard all the evidence and determined the case should be submitted to the jury on a fact basis. The district court granted Respondent's motion as a matter of law totally disregarding this court's decision in *Meritor Savings Bank* at 72 which states "absence of notice to an employer does not insulate that employer from liability." The Petitioner had tried on numerous occasions to talk personally with the Superintendent about the sexual demands by her supervisor to explain that she had been recommended to be terminated not because of the alleged padding of her hours, which was shown to be a pretext, but for other reasons. This was Petitioners only reasonably available avenue of complaint after being an excellent employee for 20 years and she was told by the Superintendent she would have to convince her

supervisor to keep her. The Superintendent admitted this at trial stating, "If a supervisor recommended that a person be terminated and the person comes directly to me, I'm going to tell then that they're going to have to always start back with that supervisor. . . ." (Vol. II, TE 37). Petitioner had been so humiliated and ashamed of what was happening to her that she had been unable to even tell her husband and did not do so for months after she was terminated.

In Barnes' twenty years of employment she had never been disciplined but had only received good performance evaluations. (Vol II, TE 58-59). Another female who was supervised by the same supervisor, Keenan, had been pushed, poked on her arms until bruised and talked to very badly. This employee, as well as another female employee who had been pushed by Keenan was told when the information was reported to the superintendent to resolve the problem with their supervisor, Keenan. (Vol I, TE 116, 119-122; Vol II, 59-60). The Board of Education knew Keenan's conduct towards women and made no effort to stop or proceed with any action to stop Supervisor Keenan's harassment of Barnes or any of the other female employees he supervised. The Sixth Circuit ignored the issue of notice upon which the district court originally overruled the jury's verdict. In *Yates v. Avco Corp.*, 819 F. 2d 6301 6th Cir. 1987) the Sixth Circuit agrees with this Court in *Meritor* that notice is not an absolute requirement.

The sixth circuit affirmed the district court's granting of Respondent's motion as a matter of law, however, it's determination was on a different basis that Barnes had not proven sufficient evidence of her hostile environment totally relying on the objective standard in finding the evidence was insufficient to create a hostile work environment. Petitioner's testimony was specific in setting forth that her supervisor had

rubbed up against her, fondled her and even demanded sex from her if she wanted to keep her job, and how embarrassing and humiliating this was for her creating an offensive work environment. This determination to grant Respondent's motion as a matter of law and the sixth circuit's affirming this decision was totally contrary to the standard of proof as established in the sixth circuit and in this Court. *Rabidue v. Osceola Refining Co.*, 805 F. 21 611 (6th Cir. 1986) and *Meritor*.

The decision by the sixth circuit was based totally on the basis that while Petitioner satisfied the subjective standard she failed on an objective standard. This ruling is totally in opposition to the growing number of cases in the different circuits that sexual harassment should be judged from the "victim's perspective. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993),this court affirmed the test as set forth in *Meritor* but addressed the importance of the plaintiff's subjective perception of the alleged abuse or humiliation. Moreover, the Sixth Circuit, in *Yates*, created a modified version of the objective standard called the reasonable woman standard in which the fact-finder is to look at the severity of the difficult or unpleasant working conditions as felt and understood by someone in the shoes of a reasonable woman. In the case at hand, this analysis was disregarded. Moreover, the standard of the "totality of the circumstances" as set forth in *Harris* was totally ignored by the Sixth Circuit in affirming the district court's judgment as a matter of law after a jury verdict in her favor in how these offensive physical contacts and sexual demands affected Petitioner's employment as the sixth circuit court viewed this harassment as individual isolated incidents.

In a recent case decided by the Sixth Circuit in which the facts are not comparable to Petitioner's case as Petitioner was fondled on more than one occasion and had the most

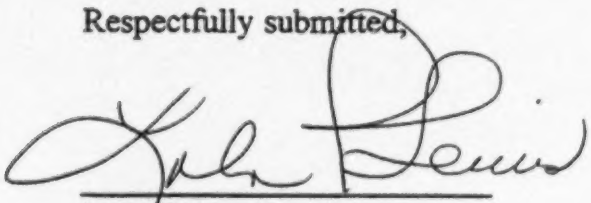
severe sexual demands placed upon her in order to keep her employment with no avenue for notice was *Black v. Zaring Homes, Inc.*, 104 F. 3d 822 (6th Cir. 1997). In *Black*, the sixth circuit again relied solely on the objective standard in finding that the evidence was insufficient to support a finding that the comments were severe or pervasive enough to create an objectively hostile environment. In *Black*, in meetings which the Plaintiff was involved she asserted that sexual comments were made which created a hostile environment. Petitioner is not contending *Black* meets the standard as she did but is only citing it to show the sixth circuit is solely using the objective standard. Therefore, totally ignoring this court's analysis in *Harris* (that the analysis is to be based totally on the circumstances) and their own analysis in *Yates* (of the analysis on the reasonable woman standard). More importantly, the sixth circuit disregarded the standard for hostile work environment as set forth in *Meritor* which Petitioner met.

Despite the testimony by Petitioner as to the events that had taken place when her supervisor had demanded sexual favors for her job, rubbed her and fondled her and created a hostile environment in her work place which not only created an offensive and abusive work environment but created great stress and humiliation for her in having to deal with being sexually abused by her supervisor and upon her rejection of his demands her employment was terminated on a pretext basis. Despite all of the above, the district court found that the employer was not liable due to lack of notice and the sixth circuit affirmed on the basis that the hostile work environment was not objectively abusive or hostile work environment because there was no proof of a material factor in Barnes's claim of hostile work environment sexual harassment.

CONCLUSION

For the foregoing reasons, Petitioner Barnes requests that this Court grant certiorari in the above-captioned matter.

Respectfully submitted,



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APPENDICES

APPENDIX A

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NOT RECOMMENDED FOR PUBLICATION
NO. 95-6121
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SANDRA S. BARNES	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
MONTGOMERY COUNTY BOARD OF EDUCATION	)
	)
Defendant-Appellee.	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: JONES, RYAN, and MOORE, Circuit Judges.

PER CURIAM. Plaintiff appeals the district court's granting of judgment as a matter of law in this sexual harassment case. Following a jury trial, the jury returned a verdict in Plaintiff's favor finding that she had proven her hostile work environment sexual harassment claim. Defendant then moved for judgment as a matter of law which was granted by the district court. For the following reasons, we affirm the judgment of the district court.

I.

Plaintiff Sandra Barns, a 49 year-old-female, was employed as a school bus driver by Defendant Montgomery County Board of Education, in Mt. Sterling, Kentucky, for approximately 20 years. On May 30, 1992, Barnes was terminated from her position. The reasons for Barnes dismissal are disputed.

Barnes contends that she was dismissed because she did not submit to the sexual advances of her supervisor, Tim Keenan, the Director of Transportation. She maintains that on three separate occasions Keenan subjected her to sexual discrimination and made sexual advances towards her.

Barnes maintains that the first incident occurred in April 1992, when she was assigned to drive students on a field trip to Hilton Head, North Carolina. Prior to the trip, Keenan called Barnes into his office and "brushed up" against her while discussing arrangements for the trip. The second incident occurred when Barnes was cleaning out the bus following the field trip. Keenan approached Barnes in the bus garage and placed his hands on her buttocks. The third incident occurred when Barnes met with Keenan in his office for an evaluation. Keenan grabbed Barnes's buttocks and stated that he was interested in Barnes and insinuated that she

would have to submit to his advances in order to keep her job.

The Board of Education contends that Barnes was dismissed from her position because she "padded her hours" on two trips, when she drove students from Mt. Sterling, Kentucky, to Louisville, Kentucky. The Board of Education maintains that after investigating the trips, the School Superintendent, Richard Hughes, suggested that Barnes not be re-employed for the following school year. Barnes maintains that the hours she recorded for these two trips were accurate. The Board of Education asserts that this is the only reason that Barnes was dismissed; it contends that Keenan did not sexually harass Barnes nor make sexual advances towards her.

On July 20, 1993, Barnes filed a complaint against the Board of Education, Richard Hughes, and Tim Keenan alleging that she had been subjected to sexual discrimination, in violation of Title VII, 42 U.S.C. § 2000(e) *et seq*. Barnes also alleged age discrimination claims, as well as pendent state law claims, which were dismissed prior to trial.

Trial to a jury wa held on March 1-2, 1995. The jury found for Barnes on her sexual harassment claim based on hostile work environment and awarded damages in the amount of $159,895.00. The jury found for the Board of Education on Barnes's claim of quid pro quo sexual harassment. The Board of Education moved for judgment as a matter of law on the hostile work environment claim, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The district court granted the Board of Education's motion for judgment as a matter of law finding that jury's verdict was unsupported by the evidence because there was no evidence that the Board of Education had any

knowledge of Keenan's alleged conduct. This appeal follows.

II.

The sole issue on appeal is whether the district court erred in granting judgment as a matter of law to Defendant, finding that Barnes's claim of hostile work environment sexual harassment was unsupported by the evidence.

This court applies the same standard in reviewing motions for judgment as a matter of law as the district court uses in deciding such motions. *Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 56 F.3d 726, 733 (6th Cir. 1995). A district court considers the evidence in the light most favorable to the non-moving party, giving the non-moving party the benefit of all reasonable inferences. *Hunt v. Coynes Cylinder Co.*, 956 F.2d 1319, 1328 (6th Cir. 1992) (citation omitted). The motion should be granted "whenever there is a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist such that reasonable minds would not differ." *Tuck v. HCA Health Services of Tennessee, Inc.*, 7 F.3d 465, 469 (6th Cir. 1993).

In order to present a cognizable claim of hostile work environment sexual harassment, a plaintiff must demonstrate that:

> 1) the employee is a member of a protected class; 2) the employee was subject to unwelcomed sexual harassment . . .; 3) the harassment complained of was based on sex; 4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an

intimidating, hostile, or offensive work environment . . .; and 5) the existence of respondeat superior liability.

Fleenor v. Hewit Soap Co., 81 F.3d 48, 49 (6th Cir.), *cert. denied*, 117 S. Ct. 170 (1996) (quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986)). Barnes's claim must fail because she does not establish the existence of an intimidating, hostile, or offensive work environment, the fourth element of her case.

Viewing the evidence in the light most favorable to Barnes, Keenan's actions did not create an intimidating, hostile or offensive work environment. To create a cognizable claim of hostile work environment sexual harassment, the alleged actions must be "sufficiently severe or pervasive to alter the conditions of the [the victims's] employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotation marks and citation omitted). In *Harris v. Forklift Systems, Inc.*, the Court reaffirmed this standard and concluded that the determination of an offensive or abusive environment should be judged by both a subjective and objective standard. *Harris*, 510 U.S. 17, 21-22 (1993). The *Harris* Court concluded that a hostile or offensive work environment must be determined by looking at the totality of the circumstances and outlined a non-exhaustive list of factors to be considered: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

While Barnes perceived her work environment to be hostile and abusive, thus satisfying the subjective standard of *Harris*, Keenan's conduct was not severe or pervasive enough

to create an objectively hostile work environment. *See id.* at 21. Examining Keenan's actions using an objective standard, Keenan's actions were isolated occurrences which did not unreasonably interfere with Barnes's work performance. Although the incidents were offensive and inappropriate, they are not so severe and pervasive that the incidents created an objectively hostile or abusive work environment.

Looking at the totality of the circumstances, the actions did not occur frequently, were not particularly severe nor were they physically threatening. As a result, using an objective standard, the actions would not unreasonably interfere with the ability of an employee to perform her job.

Consequently, Barnes fails to demonstrate an objectively abusive or hostile work environment. We find that the district court correctly granted judgment as a matter of law because there is no proof of a material factor in Barnes's claim of hostile work environment sexual harassment.

III.

For the reasons stated herein, we **AFFIRM** the decision of the district court granting the Board of Education's motion for judgment as a matter of law.

APPENDIX B

Eastern District of Kentucky
FILED
JUL 24 1995
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 93-305

SANDRA S. BARNES,	)	
	)	
Plaintiff	)	
	)	
v.	)	**OPINION AND**
	)	**ORDER**
MONTGOMERY COUNTY BOARD OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

Plaintiff, Sandra S. Barnes, a 49-year-old female, was employed by the Montgomery County Board of Education as a school bus driver for approximately twenty (20) years, until May 30, 1992, when her employment was not renewed for the next school year. Plaintiff filed this action against the Montgomery County Board of Education alleging that in not renewing her employment, the Defendant subjected her to sexual discrimination, in violation of Title VII, 42 U.S.C.

§2000(e), *et seq*. Plaintiff also filed pendent state claims for sexual discrimination, in violation of K.R.S. 344.040, and for intentional infliction of emotional distress based on outrageous conduct.

This action was tried on March 1-2, 1995. The jury found for the Plaintiff on one of her two sexual harassment claims (the hostile or abusive working environment claim) and awarded Plaintiff total compensatory damages of $159,895.00. The jury found for the Defendant on the other sexual harassment claim (the quid pro quo claim).

This matter is before the Court on the following post-trial motions that have been fully briefed and are ripe for review:

1. The Defendant has moved for judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(b), or in the alternative, for a new trial, pursuant to Fed.R.Civ.P. 59(e).

2. Plaintiff has moved the Court for an award of costs and attorney's fees, pursuant to Title VII of the Civil Rights Act (42 U.S.C. §2000(e)-5(k)) and K.R.S. Chapter 344, as a prevailing party against the Defendant.

II. THE PENDING MOTIONS

A. Defendant's motion for judgment as a matter of law or, in the alternative for a new trial

As grounds for this motion, the Defendant contends that the jury's finding in Plaintiff's favor on her hostile working environment sexual harassment claim is unsupported by the evidence and that proof on this particular claim was insufficient as a matter of law to impose vicarious liability on

the Defendant for the alleged conduct of Tim Keenan. The Defendant submits that the absence of evidence to support the jury's verdict on this claim implies that the jury's verdict in Plaintiff's favor on this claim was in fact a verdict evoked out of sympathy for one whose employment was discontinued after twenty years of service.

In objecting to this motion, Plaintiff argues that this motion should not be considered because it was not timely filed but that if considered it should be denied on the merits because the evidence was sufficient to support a finding in Plaintiff's favor on her hostile working environment sexual harassment claim under both Title VII and K.R.S. 344.040.

Applicable Law

One of the leading sexual harassment cases is *Meritor Savings Bank v. Vincent*, 477 U.S. 57 (1986), which recognized that two different types of sexual harassment are actionable under Title VII: quid pro quo sexual harassment and hostile working environment sexual harassment. The *Meritor* Court stated:

> . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

477 U.S. at 67.

One of the issues considered in *Meritor* was whether an employer is always automatically liable for the sexually harassing conduct of a supervisory employee. The *Meritor*

Court declined to hold that an employer is always automatically liable for the sexually harassing conduct of a supervisory employee, concluding that "Congress wanted courts to look at agency principles for guidance in this area." *Id.* at 72.

Meritor was rendered on June 19, 1986. Subsequently, on November 13, 1986, the Sixth Circuit decided *Rabidue v. Osceola Refining Company*, 805 F.2d 611 (6th Cir. 1986), which established a five-part test for evaluating sexually hostile work environment claims, and on November 18, 1986, the Sixth Circuit decided *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644 (6th Cir. 1986). In *Highlander*, the Sixth Circuit recognized that:

> In a quid pro quo sexual harassment action, an employer is held strictly liable for the conduct of supervisory employees having plenary authority over hiring, advancement, dismissal and discipline under the theory of respondeat superior.

Id. at 648.

Concerning a hostile work environment sexual harassment claim, the *Highlander* court stated:

> . . . The *Rabidue* court also noted that, unlike *quid pro quo* sexual harassment claims which may be predicated upon a single incident of sexual harassment, hostile environment claims are characterized by varied combinations and frequencies of hostile sexual exposures. Thus, in an action alleging a hostile work environment, the plaintiff has the burden of

demonstrating that 'injury resulted not from a single isolated or offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency.' *Rabidue*, at 620.

805 F.2d at 649-50.

In 1987, the Sixth Circuit decided *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987), where a supervisory employee was accused of sexual harassment, and the employer had notice of the employee's conduct as early as 1980. The *Yates* court observed:

> Here we have a company with a sexual harassment policy that did not function properly, coupled with a twenty-eight year supervisory employee who harassed women on a daily basis in the course of his supervision of them. Thus, even under traditional agency principles, Avco should be liable. The essential question in applying agency principles is whether the act complained of took place in the scope of the agent's employment. This determination requires an examination of such factors as *when* the act took place, *where* it took place, and whether it was *foreseeable*.

Id. at 636.

Thus, in order to prove a hostile working environment claim, the plaintiff must show that the conduct must be sexual in nature and foreseeable and that the employer had notice of the offending employee's conduct.

Discussion

As a preliminary matter, the Defendant's motion for judgment as a matter of law, or alternatively, for a new trial was timely filed. These alternative motions must be filed no later than ten (10) days after entry of the judgment. Fed.R.Civ. P. 6(a) provides:

> . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

The judgment was entered on March 3, 1995, and the Defendant's alternative motions were filed on March 14, 1995. Since the two intermediate Saturdays, March 4 and 11, and the two intermediate Sundays, March 5 and 12, are excluded from the computation, it is clear that the Defendant's motions were timely filed.

1. The jury instruction

Based on the applicable law, the Court gave the following instruction to the jury on Plaintiff's hostile working environment claim:

INSTRUCTION NO. 8

> To prevail on her hostile working environment sexual harassment claim against the Defendant, Plaintiff must prove each of the following elements of this claim:
>
> **First:** That Tim Keenan was an agent of the employer;

Second: That Tim Keenan subjected Plaintiff to unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical contact of a sexual nature;

Third: That Tim Keenan's conduct had the effect of creating a workplace permeated with discriminatory behavior that was sufficiently severe or pervasive so as to create an environment which a reasonable person would find hostile or abusive and that the Plaintiff in fact perceived her work environment as hostile or abusive; and

Fourth: That the Defendant knew or should have known of the alleged conduct by Tim Keenan and failed to implement prompt and corrective action.

Concerning the "conduct" described in the third element, conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment does not amount to sexual harassment. Whether an environment is "hostile" or "abusive" must be determined by looking at all of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating and whether it unreasonably interferes with the employee's job performance.

As to the fourth element, an employer is liable for sexual discrimination if the

employer has notice of the sexually harassing conduct by actual knowledge or constructive notice. Constructive notice may occur if the harassment is so pervasive as to lead a reasonable employer to conclude that sexual harassment has occurred or is occurring in the workplace.

> If you find that Plaintiff has proved each of these elements by a preponderance of the evidence, then you shall find for the Plaintiff; otherwise, you shall find for the Defendant.

See Docket Entry #129.

2. The evidence regarding the hostile working environment claim

Plaintiff was the bus driver for a school trip to Hilton Head, South Carolina, for spring break in 1992. Plaintiff stated that prior to the trip, Keenan repeatedly called her into his office to discuss the trip, that he had brushed up against her a couple of times while she was in his office, and that she had begun to feel uncomfortable around him. Upon her return from Hilton Head, Plaintiff encountered Keenan at the bus garage while she was cleaning her bus. Plaintiff testified that Keenan pinched her on the buttocks while she was in the bus garage and that she slapped him. After this incident, Plaintiff stated that she made it a point to have minimal contact with Keenan. There was no proof that Plaintiff reported Keenan's conduct at the bus garage to the school superintendent or to any other employees of the Defendant.

Peggy Purvis Stelzer, the school board transportation clerk while Keenan was Director of Transportation, occupied an office adjacent to Keenan's office. Mrs. Stelzer testified

that Keenan had shoved her on one occasion and that she had reported this incident to the school superintendent. However, Mrs. Stelzer also testified that Keenan made no sexual statements, overtures, advances or exhibited any other sexually related conduct toward her and that she had not observed Keenan engage in any sexually offensive conduct toward Plaintiff. At the time of trial, Mrs. Stelzer was living in Ohio and was no longer employed by the Defendant; her testimony was entirely credible.

Debbie Arnold was Keenan's secretary when he was Director of Special Education in 1990 and 1991. She stated that Keenan was never abusive toward her and that he was always polite and complimentary. In her opinion, Keenan was not qualified to perform the duties as Director of Special Education; however, Debbie Arnold had no other complaints about Keenan.

Judy Baker, another school bus driver, testified that in 1993, subsequent to Plaintiff's non-renewal in 1992, Keenan pushed her toward a doorway and requested that she clean out some buses in preparation for a state inspection. However, she stated that Keenan had made no sexual advances and no sexual comments to her.

Plaintiff presented no evidence to show that the Defendant knew or should have know of Keenan's sexually harassing conduct at the bus garage after the spring break trip to Hilton Head in 1992. When Plaintiff discussed her time sheets with Jim Brown on May 5, 1992, she did not inform him of Keenan's conduct at the bus garage, and she did not attempt to report the bus garage incident to anyone until after she learned that she was not going to be re-employed as a school bus driver for the 1992-93 school year. Plaintiff testified that in her telephone conversations with the school

superintendent during this period of time, she did not inform him over the telephone of Keenan's behavior but instead attempted to discuss Keenan's behavior with the school superintendent in person; however, a face-to-face meeting between Plaintiff and the school superintendent never occurred in the spring or summer of 1992.

Donald Maze, the County Attorney in Bath County, Kentucky testified that in the late summer or early fall of 1992, Plaintiff consulted him about Keenan's behavior and the non-renewal of her employment; however, notice to a third party of Keenan's behavior cannot be imputed to his employer. *Karibian v. Columbia University*, 812 f.Supp. 413 (S.D. N.Y. 1993).

Analysis

As noted above, in Instruction No. 8, the jury was instructed that there were four elements of Plaintiff's hostile working environment sexual harassment claim and that she had to prove all four of those elements before the jury could return a verdict in her favor on this claim. Upon review of the evidence adduced at trial, the Court concludes that the evidence presented in support of Plaintiff's claim, as summarized above, fails to support that claim. Specifically, the evidence was marginal at best concerning the third element of this claim (a workplace permeated with discriminatory behavior) and was completely lacking in respect to the fourth element of this claim (notice to the employer of the discriminatory conduct). As recounted above, there was absolutely no proof that the Defendant had any knowledge of Keenan's discriminatory conduct exhibited toward the Plaintiff in the spring of 1992 and failed to take measures to correct his alleged behavior.

For the reasons stated above, the jury's verdict in favor of the Plaintiff on her hostile working environment sexual harassment claim is unsupported by the evidence, as there was no evidence that the employer had any knowledge of Keenan's alleged conduct. Therefore, pursuant to Fed.R.Civ.P. 50(b), the Defendant is entitled to judgment as a matter of law on this claim.

B. Plaintiff's motion for attorney's fees

As a prevailing party in this action, Plaintiff has moved for an award of attorneys' fees and costs, pursuant to 42 U.S.C. §2000(e)-5(k) and K.R.S. Chapter 344, which authorizes the Court in its discretion to award costs and a reasonable attorney's fee to the prevailing party in a Title VII action. Plaintiff requests the Court to award her an attorney's fee of $63,958.00 and out-of-pocket expenses of $2,436.00

The Defendant objects to this motion, arguing that Plaintiff's motion is unsupported by any itemization of the work performed or the hours expended by counsel on Plaintiff's behalf and that Plaintiff inappropriately seeks an attorney's fee based on a 40% contingency fee contract which was forbidden in *Burlington v. Dague*, 112 S.Ct. 2638 (1992).

Analysis

Since the Court has determined that the Defendant is entitled to judgment as a matter of law on Plaintiff's hostile working environment sexual harassment claim, Plaintiff is not a prevailing party herein; therefore, she is not entitled to an attorney's fee.

Accordingly, **IT IS HEREBY ORDERED and ADJUDGED that:**

1. The Defendant's motion for judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(b), on Plaintiff's hostile working environment sexual harassment claim [DE #135] is **GRANTED**.

2. The jury's verdict in Plaintiff's favor on her hostile working environment sexual harassment claim is unsupported by the evidence in that there was no proof that the employer had notice of Keenan's discriminatory conduct exhibited toward Plaintiff in the spring of 1992.

3. The jury's verdict in Plaintiff's favor on her hostile working environment sexual harassment claim and the judgment entered on March 3, 1995 [DE #133], for the Plaintiff in accordance with the jury's verdict on March 2, 1995, are **VACATED** and **SET ASIDE**.

4. Plaintiff's motion for an award of attorney's fees pursuant to Title VII of the Civil Rights Act (42 U.S.C. §2000(e)-5(k)) and K.R.S. Chapter 344 [DE #137] is **DENIED**.

This 24th day of July, 1995.

/s/
KARL S. FORESTER, JUDGE

APPENDIX C

Eastern District of Kentucky
FILED
JUL 26 1995
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 93-305

SANDRA S. BARNES,	)	
	)	
Plaintiff	)	
	)	
v.	)	**JUDGMENT**)
MONTGOMERY COUNTY BOARD OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

In conformity with the Court's Opinion and order entered herein on July 24, 1995,

IT IS ADJUDGED, that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, Montgomery County Board of Education, record of the plaintiff, Sandra S. Barnes, its costs of action.

This 26th day of July, 1995

/s/
KARL S. FORESTER, JUDGE

NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT ON 07/26/95
LESLIE G. WHITMER, CLERK

BY: /s/